ORIGINAL No. 00-986 ORIGINAL

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

DETNAKONE PHETSANY
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under 8 U.S.C. §1231(a)(6), the Attorney General has the statutory authority to indefinitely detain a long-time resident alien of the United States beyond the 90-day removal period even if the deportation order cannot be effectuated in the reasonably foreseeable future.

Whether, if the Attorney General has the statutory authority to detain a long-time resident alien of the United States without time limitation under U.S.C. §1231(a)(6), that provision violates Detnakone Petsany's Fifth Amendment Due Process rights because his deportation cannot be effectuated in the reasonably foreseeable future and, even if his deportation was foreseeable, his detention for dangerousness alone is unconstitutional.[1]

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[1]Neither the District Court, nor the Court of Appeal reached the due process issue raised by Petitioner.

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OPINIONS BELOW

The petition for *certiorari* correctly cites to the unreported district court and Court of Appeals opinions below. App. to Pet. for Cert. 1a - 4a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. §1231(a)(6), 8 C.F.R §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Phetsany's release is 8 U.S.C. §1253(b) which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this

title or knowingly give false information in response to an inquiry under such section shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall ... be deprived of life, liberty or property, without due process of law[.]"

STATEMENT

The lower court opinions correctly set forth the facts of the case and the procedural background. App to Pet. for Cert. 1a - 4a.

By writ of habeas corpus, Mr. Phetsany challenged on statutory and federal constitutional grounds, his ongoing detention by the INS because his deportation order cannot be effectuated in the reasonable foreseeable future, if ever. Both of the lower courts ruled in Mr. Phetsany's favor, and Mr. Phetsany was released from detention into INS supervision in May, 2000. The Court of Appeals summarily affirmed the grant of Mr. Phetsany's writ of habeas corpus based on the circuit's decision in *Ma v. Reno*, 208 F.3d 815 (9th Cir.) *Pet. reh'g denied* (June 2, 2000), *cert. granted*, 121 S. Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38). In light of the grant of *certiorari* in *Ma*, Mr. Phetsany waived his right to file a Brief in Opposition. On February 8, 2001 a response to the Petition of Certiorari was requested by this Court.

ARGUMENT

The questions presented by this case are whether the Attorney General has the statutory authority to detain a long-time resident alien of the United States whose deportation order cannot be effectuated in the reasonably foreseeable future, if ever, and if so, whether that detention runs afoul of Mr. Phetsany's substantive and procedural due process rights under the Fifth Amendment of the United States Constitution. These same

issues are presented in *Ma v. Reno, supra*, and *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297, 69 USLW 324, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791), in which the Court granted *certiorari* on October 10, 2000 and heard oral argument on February 21, 2001.

Accordingly, Mr. Phetsany does not waive any objections to the government's recitation of the proper legal analysis in his case, however, because Mr. Phetsany has been released from detention, he agrees with the government that consideration of the government's petition in this case should be held pending the Court's decision in *Ma* and *Zadvydas*.

CONCLUSION

The petitioner's petition for *certiorari* should be held pending this Court's decision in *Reno v. Ma*, No. 00-38, and *Zadvydas v. Underdown*, No. 99-7791, and then affirmed or remanded as appropriate in light of the decisions in those cases.

Respectfully submitted,

Linda Harter
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Daniel Broderick
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Counsel of Record

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Federal Public Defenders Office
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March 7, 2001

No. 00-986

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

DETNAKONE PHETSANY,
Respondent,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent Detnakone Phetsany, pursuant to Supreme Court Rule 39 and 18 U.S.C. § 3006A(7), asks leave to file his response by Respondent to Petition for Writ of *Certiorari* to the United States Supreme Court without prepayment of costs, and to proceed *in forma pauperis.*

On September 22, 1998, the Federal Public Defender for the Eastern District of California was appointed by the United States District Court for the Eastern District of California to represent Detnakone Phetsany in the underlying civil case and on appeal to the Ninth Circuit Court of Appeals. This appointment was made pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(a)(2)(b).

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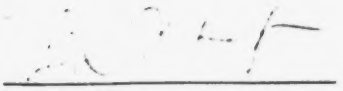
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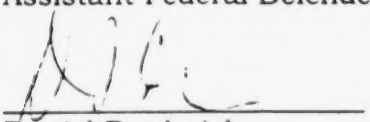
WHEREFORE, the respondent, by and through the undersigned, respectfully prays for leave to proceed in the Supreme Court of the United States *in forma pauperis*.

DATED this 7th day of March, 2001.

Respectfully submitted,



Linda Harter
Assistant Federal Defender



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Attorneys for Respondent Detnakone Phetsany

CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

DETNAKONE PHETSANY,
Respondent,

I, Linda Harter, being first duly sworn, deposes and say:

On March 7, 2001, I, a member of the Bar of this Court, caused the **Response by Respondent to Petition for Writ of Certiorari and the Motion for Leave to Proceed in Forma Pauperis** to be served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on March 7, 2001, addressed to counsel as follows:

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Served pursuant to Rule 29.4(a) & 29.5(b)

DATED: March 7, 2001

Linda Harter